Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

JAMES E. GINGER, SARGEANT, SPECIAL OPERATIONS DIVISION; PAUL E. HUSTLER, OFFICER, SPECIAL OPERATIONS DIVISION; SEAN S. LAGRAND, OFFICER, SPECIAL OPERATIONS DIVISION; MICHAEL J. LEWIS, OFFICER, SPECIAL OPERATIONS DIVISION; BERNARD D. RICHARDSON, OFFICER, SPECIAL OPERATIONS DIVISION; MARK W. WOOD, OFFICER, SPECIAL OPERATIONS DIVISION; ROBERT M. WIGTON; ROY POTTER, OFFICER, SPECIAL OPERATIONS DIVISION, PETITIONERS

v.

DISTRICT OF COLUMBIA; CHARLES H. RAMSEY, CHIEF OF POLICE, IN BOTH HIS OFFICIAL AND INDIVIDUAL CAPACITIES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), apply to mixed-motive claims at the summary judgment stage?

2. Is a Title VII plaintiff required to prove that an unlawful motive was the sole motive for a challenged action unless he designates his case as "mixed-motive"?

    a. Can a plaintiff who alleges a violation of 42 U.S.C. § 2000e-2(a)(1) proceed to trial with evidence that race was considered in the challenged action but was not the sole motive?

    b. Is a plaintiff who argues that his employer's proffered reasons are pretextual or who otherwise seeks to use the *McDonnell Douglas* framework, required to prove that an unlawful motive was the sole motive for the challenged action?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit, *Ginger v. District of Columbia*, 527 F.3d 1340, 381 U.S.App.D.C. 252 (D.C.Cir. 2008) is reproduced in the attached Appendix[1] at a1. The Memorandum Opinion and Order of the United States District Court for the District of Columbia, *Ginger v. District of Columbia*, 477 F.Supp.2d 41 (D.D.C. 2007) is reproduced in the Appendix at a16. The orders denying rehearing by the panel and hearing *en banc* denied, decided July 31, 2008, are unpublished and reproduced in the Appendix at a43 and a45, respectively.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered on June 10, 2008 by a Writ of Certiorari under 28 U.S.C. § 1254(1). The D.C. Circuit denied a timely Petition for Rehearing and Suggestion for Hearing En Banc, on July 31, 2008.

STATUTORY PROVISIONS INVOLVED

§ 2000e–2. Unlawful employment practices

(a) Employer practices
It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against

[1] Refers to the Appendix to this Petition

any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices.

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

§ 2000e–5. Enforcement provisions

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful

employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)
(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e–3 (a) of this title.
(B) On a claim in which an individual proves a violation under section 2000e–2 (m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2 (m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

STATEMENT OF THE CASE

A. Procedural History

Petitioners are seven white and one African-American District of Columbia Metropolitan Police Department ("MPD") Officers who work in the Canine Unit. They filed a Complaint against the Defendant District of Columbia, on December 9, 2003, contending that the MPD discriminated against them by transferring them from the night shift based on their race and retaliated against them for complaining about the racially-motivated reorganization. The District of Columbia filed its Answer on February 4, 2004, and an Answer to the Amended Complaint on July 17, 2006.

On July 19, 2006, the District filed a Motion for Summary Judgment contending that the officers could not raise an inference of discrimination, did not suffer an adverse action, were not members of a protected class, and presented no evidence of retaliation. Petitioners opposed that motion on September 8, 2006, contending that the transfer and pay loss constituted an adverse action, that the evidence was sufficient to raise an inference of race discrimination and retaliation, and that the plaintiffs had presented sufficient evidence for

a reasonable juror to conclude that the articulated reasons for the adverse action were a pretext for discrimination.

On March 5, 2007, the district court granted Appellee's Motion for Summary Judgment, and filed a Memorandum Opinion. Appellants timely filed their Notice of Appeal on April 2, 2007. Appendix at a5.

On June 10, 2008, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's decision. Appendix at a1- a15. On July 31, 2008, the court below denied rehearing by the panel and *en banc* review. Appendix at a43-a46.

B. Relevant Facts

Before a reorganization in 2003, all eight Petitioners were assigned to Squad 2 of the Canine Unit, which worked the midnight shift, from 8:00 p.m. to 6:00 a.m. Appendix at a2. Squad 2 was composed of seven white officers and one black officer. Appendix at a2. Petitioners are the eight squad members. Some time in late 2002 or early 2003, Joshua Ederheimer, the head of the Civil Rights and Force Investigations Division of the MPD, noted that Canine Unit Squad 2 was the source of 11 of the 17 dog bite cases that had occurred in 2002. Appendix at a2. Because "all but one of the officers on that squad were Caucasian and ... all of the people that had been bitten were African American," Ederheimer told Special Operations Division Commander Cathy Lanier that he was "very concerned about the racial makeup of the squad and that some kind of action had to be taken." Appendix at a2-a3. He noted that the media and the Department of Justice might flag this disparity as indicative of a civil rights violation. Appendix at a3. Ederheimer also told

Chief of Police Charles Ramsey that the white squad was a real problem. Chief Ramsey responded that he would "do something" and would "talk to ... [Division Commander] Lanier." Appendix at a3. Several officers testified that they heard Chief Ramsey say that he wanted the "white squad" broken up. Joint Appendix[2] (JA) at 186, 199, 332-33.

Later, the racial composition of Squad 2 was raised in a meeting that included Lanier, Ederheimer, and other high-level officials of the MPD. Appendix at a3. It was agreed that because the whole squad, with the exception of one officer, was white, it was "not going to look good if it ever leaks out" and the squad should be broken up. Appendix at a3. Following that meeting Lanier wrote a memorandum to Ederheimer stating in part, "The squad involved in the majority of the bites has a racial make up [sic] that is predominantly white male ... in light of the information gleaned in this analysis, changes will be made ... in order to assign members with more K-9 experience equally throughout the tours of duty. The proposed reorganization of the squads must also take into account the racial make up of those squads." Appendix at a3-a4. When Sergeant Ginger objected to this reason as violating the officers' civil rights, Commander Lanier stated that she was going to realign the squads based on seniority. J.A. at 80.

Ten days later, Lanier announced the reorganization of the Canine Unit. Appendix at a4. As reorganized, there would be five squads, each of which would work five 8-hour shifts per week. Appendix at a4. The shifts would rotate every four weeks, thereby

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[2]Refers to the Joint Appendix filed in the Court of Appeals.

eliminating the permanent midnight shift. The eight members of Squad 2 were distributed among the five new squads. Appendix at a4. All eight members of Squad 2 filed a complaint of racial discrimination with the EEOC. Appendix at a4. When the EEOC failed to take action, the officers filed suit in the district court, claiming they were victims of, *inter alia*, racial discrimination and retaliation, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. Appendix at a4-a5. At her deposition, Lanier denied that race had anything to do with her decision to split up Squad 2. J.A. at 287-88.

District Court and District of Columbia Circuit Court Holdings At Issue

The district court granted summary judgment for the defendant, 477 F.Supp.2d 41 (2007), determining that the officers had suffered adverse employment actions, but could not establish discrimination "because every officer in the Canine Unit was subjected to the reorganization" and "[t]he fact that concern about race relations plays into decision making at a macro level when developing policies on how to reorganize a police unit" does not render the reorganization discriminatory. Appendix at a24-a25. The district court also held the alleged instances of retaliation were either insufficiently serious to support a claim for retaliation or lacked evidentiary support. Appendix at a33-a37.

The court of appeals affirmed, *Ginger v. District of Columbia*, 527 F.3d 1340 (D.C. Cir. 2007). The court rejected the district court's conclusion "that concern about race relations" could be part of the basis for reorganizing a police unit, holding that even

"legitimate" racial concerns did "not make it permissible for an employer to subject an employee to an adverse employment action because of his race." Appendix at a9-a10. However, the court affirmed the grant of summary judgment on the grounds that the officers failed to establish pretext and failed to establish that race was the "sole motivation" for the reorganization. Appendix at a13. The court affirmed summary judgment despite finding sufficient evidence of mixed-motive:

> In this case the officers proffered evidence indicating that race was a motivating factor behind the reorganization. As we have seen, both Ederheimer and Buethe testified that they participated in meetings with Lanier in which they each expressed the concern that an almost all-white squad was responsible for a disproportionate number of the dog bites caused by the entire Canine Unite, and shortly before the reorganization, Lanier wrote a memorandum to the same effect.

Appendix at a11. The court set this evidence aside, however, because it found that the officers brought a "single motive case" which requires proof that race was the "sole reason for the reorganization." Appendix at a11.

The court also held the that there was no evidence of causal link between officers' filing of administrative race discrimination complaints and subsequent change in weekend assignments. Appendix at a14.

REASONS FOR GRANTING THE WRIT

In *Desert Palace, Inc. v. Costa*, this Court held in a mixed-motive employment discrimination case that a plaintiff could prove that a protected characteristic is a motivating factor in an employment decision through both direct and circumstantial evidence. *See generally* 539 U.S. 90, 98, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). That ruling has raised important questions regarding the standard of causation and how circumstantial evidence should be assessed in discrimination cases. First, does the *McDonnell Douglas* burden-shifting framework apply to mixed-motive cases, and, if so, in what form? *See generally* Katz, Unifying Disparate Treatment (Really), 59 Hastings L.J. 643 (2008) (noting the expense and inefficiency regarding the confusion over which framework applies in particular cases). While some courts continue to require the *McDonnell Douglas* framework for all disparate treatment claims, others refuse to apply it to so-called mixed-motive claims, others permit employees to use it, and still others apply a modified version of the test to mixed-motive claims. *See generally* Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 Am. Bus. L.J. 511 (2008) (describing the inconsistent application of the *McDonnell Douglas* test).

Second, when, if ever, is a discrimination plaintiff required to prove that a protected characteristic is the *sole* cause of an employment practice. The circuit courts are split on this question, with several requiring plaintiffs to prove that discrimination was the sole motive unless the plaintiff

specifically asserts that his is a mixed-motive case. These courts therefore dismiss cases at summary judgment even where there is evidence that discrimination played a part in an employment decision. In the case at bar, the D.C. Circuit did just that: despite significant evidence that race motivated the employment decision, the court granted summary judgment because the officers did not specify that their case was one of "mixed-motives." *See, e.g.*, Appendix at a11 ("The officers might have had a compelling case had they argued race was one of multiple motivating factors behind the reorganization, but they did not.").

As discussed in further detail below, the federal judiciary has been anything but uniform in applying Title VII's disparate treatment provisions. This Court should grant this petition to establish that the mixed-motive analysis applies to cases where a plaintiff sets out to prove pretext or otherwise relies upon the *McDonnell Douglas* framework.

I. Courts of Appeal Disagree Regarding Whether To Analyze Evidence of Mixed-Motive Under the *McDonnell Douglas* Burden-Shifting Framework.

This Court's decision in *Desert Palace* made clear that circumstantial evidence could be sufficient to support a mixed-motive claim. 539 U.S. at 98. However, because the issue before the Court involved jury instructions, the Court did not address how courts should analyze evidence of mixed motives at the summary judgment stage – specifically, whether the *McDonnell Douglas* burden-shifting framework should apply. *See Makky v. Chertoff*, 541 F.3d 205,

214-15 (3d Cir. 2008) ("It is significant that in *Desert Palace*, the Court omitted any discussion of the *McDonnell Douglas* framework as a requirement in mixed-motive cases."). Since courts have been charged with analyzing circumstantial evidence in mixed-motive cases, the courts have not been uniform in their analysis of circumstantial evidence in mixed-motive cases.

Taking one of the conflicting positions, the Third, Eighth and Eleventh Circuits have held that a plaintiff in a mixed-motive case is required to satisfy the *McDonnell Douglas* paradigm to survive summary judgment. *See Makky*, 541 F.3d at 214-15 (holding that the *McDonnell Douglas* framework applies to mixed-motive cases but not "in the way it does in a pretext case"); *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (applying *McDonnell Douglas* to mixed-motive claim and affirming grant of summary judgment because employee did not sufficiently demonstrate pretext); *Burstein v. Emtel, Inc.*, 137 Fed. Appx. 205, 209 (11th Cir. 2005). The Third Circuit has held that *McDonnell Douglas* applies to mixed-motive claims, it has not determined precisely how it should apply or what elements a mixed-motive plaintiff must satisfy. *See Makky*, 541 F.3d at 214-15 (declining to decide what parts of *McDonnell Douglas* should be applied in mixed-motive cases other than holding that a plaintiff must establish that he or she had the minimum qualifications for the job in question).

Taking a second position, the Fourth and Tenth Circuits have held that the burden-shifting paradigm does not apply to mixed-motive cases.[3] *See Fye v.*

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[3]The First Circuit has, by implication, held that *McDonnell*

Oklahoma Corp. Commission, 516 F.3d 1217, 1224-25 (10th Cir. 2008) (describing the analysis of a claim under a "mixed-motive" theory as distinct from the *McDonnell Douglas* burden-shifting analysis for "pretext" claims); *Hill v. Lockheed Martin Logistics Mgmt, Inc.*, 354 F.3d 277, 284, 285 (4th Cir. 2004) (*en banc*). The Fourth Circuit has drawn a hard line between the evaluation of evidence in mixed-motive cases and so-called single-motive or pretext cases:

> [A] plaintiff may avert summary judgment and establish a claim for intentional sex or age discrimination through two avenues of proof.
>
> First, a plaintiff may establish a claim of discrimination by demonstrating through direct or circumstantial evidence that sex or age discrimination motivated the employer's adverse employment decision. . . . In such cases, historically referred to as "mixed-motive" cases, it is sufficient for the individual to demonstrate that the employer was motivated to take the adverse employment action by both permissible and forbidden reasons.
>
> * * * * *
>
> The second method of averting summary judgment is to proceed under a "pretext"

Douglas does not apply in mixed-motive cases. *See Sher v. U.S. Dep't of Veterans Affairs*, 488 F.3d 489, 507, 508 n. 22 (1st Cir. 2007) (not considering whether the employee demonstrated mixed motives because plaintiff "presented his discrimination claim within the burden-shifting framework established in *McDonnell Douglas* . . . .")

> framework, under which the employee, after establishing a prima facie case of discrimination, demonstrates that the employer's proffered permissible reason for taking an adverse employment action is actually a pretext for discrimination.

Hill, 354 F.3d at 284-85.

In a third conflicting position, the Fifth Circuit requires mixed-motive plaintiffs to establish a *prima facie* case of discrimination as articulated in *McDonnell Douglas*, but does not require the mixed-motive plaintiff to establish pretext. *See Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 341 (5th Cir. 2005) (noting that a plaintiff can proceed along "either" the "pretext alternative" or the "mixed-motive(s) alternative" but holding that "[t]he question of pretext versus mixed-motive treatment is only reached after a plaintiff has met his *prima facie* showing under the modified *McDonnell Douglas* standard and the defendant has responded with a legitimate nondiscriminatory reason.").

A fourth conflicting position appears where the Sixth and Ninth Circuits have taken a middle ground approach. They permit, but do not require, a plaintiff in a mixed-motive case to utilize the *McDonnell Douglas* framework, noting that evidence of pretext supports an inference that an unlawful trait was a motivating factor in a challenged decision. *See White v. Baxter Healthcare Corp.*, 533 F.3d 381, 401 (6th Cir. 2008) (holding that "compliance with the *McDonnell Douglas/Burdine* shifting burdens of production is *not* required in order to demonstrate that the defendant's adverse employment action was motivated in part by a consideration of the plaintiff's race, color, religion, sex,

or national origin," but that "A Title VII plaintiff may certainly find parts of the *McDonnell Douglas/Burdine* framework to be useful in presenting a mixed-motive claim."); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004) (noting that the *McDonnell Douglas* framework is a "useful tool" and that it is plaintiff's choice whether to use it). The Sixth Circuit reasons that a plaintiff who cannot rebut or eliminate all the potential reasons for an employment action may still convince a jury that "discriminatory animus factored into the defendant's decision to take the adverse employment action." *White*, 533 F.3d at 401.

The D.C. Circuit has not been so flexible in its approach, nor has it been consistent. Sometimes it has discussed "the 'mixed-motive' framework" as distinct from the *McDonnell Douglas* burden-shifting framework and not incorporating any of its elements. *See Porter v. Natsios*, 414 F.3d 13, 18 (D.C. Cir. 2005) (laying out the elements of the "'single-motive' or 'pretext' framework" as distinct from the elements of the "'mixed-motive' framework . . . established by the Supreme Court in *Price Waterhouse*"). Other times it has stated that "[a] plaintiff may also, of course, use, evidence of pretext and the *McDonnell Douglas* framework to prove a mixed-motive case." *Fogg v. Gonzales*, 492 F.3d 447, 451 n.* (D.C. Cir. 2007).

In the instant case, the D.C. Circuit departed from its reasoning in *Fogg* that allows pretext evidence in a mixed-motive case. Instead, it rigidly adhered to a distinction between the "two ways of establishing liability in a Title VII case," holding that because the officers argued pretext, they brought a single-motive case that could not be brought to trial despite evidence indicating that race was a motivating

factor. Appendix at a10, a11. Although the court stated that the plaintiffs "brought a single motive case" and that "according to the officers, race was the sole reason for the reorganization, and the MPD's nondiscriminatory justifications were mere pretext," such sentiments appear nowhere in the officers' briefs and, in fact, the officers proffered evidence that race was a motivating factor. Appendix at a11. Rather, the D.C. Circuit appears to have imposed a "sole" reason or "sole motive" standard of causation because the officers invoked the *McDonnell Douglas* paradigm. Appendix at a11-a12.

II. The Circuit Courts Interpret *Raytheon* Differently.

Two circuit courts have looked to this Court's decision in *Raytheon Co. v. Hernandez*, 540 U.S. 44, 124 S.Ct. 513 (2003) for guidance on whether to apply the *McDonnell Douglas* framework in mixed-motive cases. However, they have interpreted its meaning differently. In *Raytheon*, this Court distinguished disparate treatment cases from disparate impact cases by holding that disparate treatment cases must be analyzed under the *McDonnell Douglas* framework. 540 U.S. at 50 n.3. The *Raytheon* decision, however, does not address whether disparate treatment cases should be analyzed differently if there is evidence of mixed-motives or if the plaintiff designates the case as one of mixed-motives.

The Eighth has interpreted this "silence" to mean that there is no distinction between the analysis of a mixed-motive claim and the so-called single-motive claims. In *Griffith*, the Eighth Circuit cited *Raytheon* for the proposition that *Desert Palace* did

not alter the application of the *McDonnell Douglas* framework and therefore the elements of *McDonnell Douglas* must be applied in all disparate treatment cases, including where there is evidence of mixed motives. 387 F.3d at 735.

The Fourth Circuit takes the opposite view of the *Raytheon* decision. It concludes that the Court's application of *McDonnell Douglas* in *Raytheon* means only that the burden-shifting framework applies only "in pretext cases" because *Raytheon* was a pretext case. *Diamond v. Colonial Life & Accident Ins. Col.*, 416 F.3d 310, 319 n.5 (4th Cir. 2005). As such, the Fourth Circuit does not apply the *McDonnell Douglas* framework in mixed-motive cases.

III. Circuits Disagree about Whether a Plaintiff Who Argues Pretext Is Required to Prove That A Protected Characteristic Was the Sole Motive for an Employment Decision.

In *Price Waterhouse v. Hopkins*, this Court held that Title VII of the Civil Rights Act prohibited even the consideration of the prohibited factors in employment decisions. 490 U.S. 228, 241-42, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *see also id.* at 239-40 ("Congress' intent to forbid employers to *take gender into account* in making employment decisions appears on the face of the statute.") (emphasis added). *Price Waterhouse* also held that a plaintiff need not label their case as a mixed-motive case at the outset in order to proceed to trial with evidence that race was a motivating factor in the employment decision. *See id.* at 247 n. 12 ("Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a 'pretext' case or a 'mixed-motives' case from

the beginning in the District Court; indeed, we expect that plaintiffs will often allege, in the alternative, that their cases are both.... At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives."). Moreover, because Congress had not yet amended the statute to include 42 U.S.C. § 2000e-2(m) when this Court decided *Price Waterhouse*, its recognition of mixed-motive claims necessarily means that such claims are cognizant under 42 U.S.C. § 2000e-2(a)(1). Yet, the circuit courts have been far from consistent in applying *Price Waterhouse* to cases where the complaint mentions 42 U.S.C. § 2000e-2(a)(1) or where the plaintiff does not argue the mixed-motive theory at the outset.

Indeed, several circuit courts have segregated disparate treatment cases into two distinct types, each with their own separate analysis. These courts either put a claim into a "pretext" box or "mixed-motive" box depending upon the statute designated by the plaintiff or the argument raised. *See* McCormick, *The Allure and Danger of Practicing Law as Taxonomy*, 58 Ark. L. Rev. 159, 183-91 (2005) (discussing the historical problem of courts' attempts to rigidly classify cases rather than analyze on a case-by-case basis); *see, e.g.*, *Fye*, 516 F.3d at 1225-29 (holding that "the distinction between a mixed-motive and pretext case is crucial on appellate review" and conducting two entirely separate analyses of plaintiff's claim under the "mixed-motive" theory and "single-motive" theory). The majority of circuit courts considering the issue have found that plaintiffs arguing pretext or bringing their cases under 42 U.S.C. § 2000e-2(a)(1) belong in the "single-motive" box and require plaintiffs to establish that discrimination was the sole reason for

the challenged action. *See, e.g., Ricci v. Destefano*, 530 F.3d 88, 29 (2d Cir. 2008) (denying rehearing *en banc* on the issue of mixed-motives because "[t]he parties did not present a mixed motive argument to the district court or to the panel."). The D.C. Circuit, for example, has put all cases brought pursuant to 42 U.S.C. § 2000e-2(a)(1) in the "single motive" box. *Fogg*, 492 F.3d at 451 (specifying that "the 'single-motive' or 'pretext' theory of discrimination [is] provided in 42 U.S.C. § 2000e-2(a)(1), and [the] 'mixed-motive' theory [is provided by] § 2000e-2(m)"); *Ginger*, 527 F.3d at 1345 (citing 42 U.S.C. § 2000e-2(a)(1) for the proposition that a "plaintiff may pursue a 'single-motive case,' in which he argues race . . . was the sole reason for an adverse employment action").

Similarly, the First and Second Circuits have put claims where the employee invokes the *McDonnell Douglas* framework in the "single-motive" box. *See Tobin v. Liberty Mutual Ins. Co.*, 433 F.3d 100, 105 n.3 (1st Cir. 2005) (refusing to consider whether employee's disability was a motivating factor in his termination because the employee did not specifically request a mixed-motive analysis at the district court); *Nettis v. Levitt*, 129 Fed. Appx. 635, 636 (2d Cir. 2005) (unpublished) (holding that jury instruction in "pretext" case could not include motivating factor language thereby imposing a sole motive burden of causation). In *Sher*, for example, the First Circuit refused to consider whether the employee had presented evidence that discrimination was a motivating factor in the adverse employment action because the plaintiff "presented his discrimination claim within the burden-shifting

framework established in *McDonnell Douglas*. . . ."[4] 488 at 507 & n.22. The court held that the plaintiff brought his claim under a "single-motive theory" although he could have brought his case under a mixed-motive theory. *Id.* at n.22.

The Sixth Circuit has been particularly equivocal on whether claims brought pursuant to Section 2000e-2(a)(1) require proof of a single motive. Although it specifically stated that a mixed-motive claim can be brought pursuant to 42 U.S.C. § 2000e-2(a)(1), it also implied, in the same case, that 42 U.S.C. § 2000e-2(a)(1) denotes a single-motive claim. *See White*, 533 F.3d at 396 (noting that mixed-motive claims as well as single-motive claims may be brought pursuant to 42 U.S.C. § 2000e-2(a)(1), "i.e., where both legitimate and illegitimate reasons motivated the employer's decision.") and at 400 n. 10 ("the McDonnell Douglas/Burdine framework continues to guide our summary judgment analysis of single-motive discrimination claims brought pursuant only to . . . 42 U.S.C. § 2000e-2(a)(1) and not pursuant to 42 U.S.C. § 2000e-2(m)").

The Ninth Circuit has employed an integrated approach. In *McGinest*, that court noted that "it is not particularly significant whether [the plaintiff] relies on the McDonnell Douglas presumption or, whether he relies on direct or circumstantial evidence of

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[4]On the other hand, the D.C. Circuit has allowed a plaintiff who argued pretext to benefit from a mixed-motive instruction. In *Porter*, the court approved of a district court's decision to simultaneously instruct the jury on how the plaintiff may prove pretext and that he did not have to prove that an impermissible consideration was the only reason for the decision. 414 F.3d at 20.

discriminatory intent to meet his burden." 360 F.3d at 1123. Indeed, the Ninth Circuit's decisions can be read to mean that plaintiffs in all disparate treatment cases need only prove that an impermissible characteristic was a motivating factor in an employment decision. *See id.* ("Under either approach, [the plaintiff] must produce some evidence suggesting that [the employer's action] was due in part or whole to discriminatory intent, and so must counter [the employer's] explanation that a hiring freeze accounted for its [decision]."). *But see Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1042 n. 7 (9th Cir. 2005) (distinguishing between "single-motive or mixed-motives theory," yet contending that the difference affects only jury instructions).

Similarly, the Third, Seventh and Eighth Circuits have recognized that evidence of pretext may raise an inference that an employer's proffered reason was not the sole reason for the employment action and that discrimination may have also been a motivating factor. *See Roberts v. Park Nicollet Health Services*, 528 F.3d 1123, 1128 (8th Cir. 2008) ("there is a genuine dispute for trial concerning whether [the employer's] claim that the termination was motivated solely by [the plaintiff's] record of tardiness is pretextual, and whether Roberts's pregnancy was a motivating factor in the employment decision."); *Hossack v. Floor Covering Associates of Joliet, Inc.*, 492 F.3d 853, 862 (7th Cir. 2007) (holding that evidence of pretext supports an inference of discrimination in a mixed-motive case). While it is often said that evidence of pretext demonstrates that discrimination was "the real reason," that is not necessarily always the case. "Instead it may be just as indicative that the employer

was not careful in its decision-making process or does not particularly know its own mind, in which case a factfinder should be allowed to draw the inference that, more likely than not, an improper motive was present." Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 Am. Bus. L.J. 511, 542 (2008).

In *Watson v. Southeastern Penn. Transportation Auth.*, Justice Alito, writing for the Third Circuit, also recognized that evidence of pretext does not suggest the presence of a single unlawful motive. Although he upheld the distinction between pretext and mixed-motive cases, Justice Alito also noted that "the 'pretext' and 'mixed-motive' labels are misleading" because so-called pretext cases "may nevertheless involve challenged action by an employer that resulted from two or more motives." 207 F.3d 207, 215 n. 5 (3d Cir. 2000); *see also id.* at 218, 220 (upholding jury instruction that an unlawful trait was a determinative factor in case brought under 42 U.S.C. § 2000e-(2)(a) because "Congress intended to draw a distinction between most disparate-treatment cases against employers (which are brought under 42 U.S.C. § 2000e-(2)(a)) and a subset of cases in which an individual proves a violation under Section 2000e-2(m)."). Thus, while the Third Circuit has espoused the view that claims must be analyzed under one theory or the other, it also recognizes that plaintiffs in "pretext" cases are not obligated to prove that a protected trait was the sole motivation for an employer's action. *See id.* at 222 (acknowledging that the court may not require a jury to find that sex was the "sole reason" for the defendant's actions).

IV. This Court Should Grant the Petition To Make Clear That A Plaintiff is Never Required to Prove That Race is the Sole Motive For an Action And that Evidence of Pretext May Be Used to Raise An Inference That Race Was a Motivating Factor.

In the case below, the D.C. Circuit put the petitioners' case in the "single-motive" box and imposed a sole motive causation burden on the plaintiffs because they invoked the *McDonnell Douglas* framework. Thus, despite finding "evidence indicating that race was a motivating factor," the circuit court upheld the decision to grant summary judgment. Appendix at a11. The court explicitly held the officers to a "solely because of" standard: "no reasonable jury could conclude the District's justifications were pretextual, leaving race as the sole motivation for reorganizing the Unit; therefore, the district court properly entered summary judgment for the District." Appendix at a13. Yet, this interpretation of the term "because of" was soundly rejected by this Court in *Price Waterhouse*. 490 U.S. at 241 ("[S]ince we know that the words 'because of' do not mean '*solely* because of,' we also know that [42 U.S.C. § 2000e-2(a)(1)] meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."); *id.* at 241 n. 7 (observing that "Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of'" (citing 110 Cong. Rec. 13, 837 (1964))). Moreover, a "solely because of" standard is nearly impossible to meet. As one commentator has noted:

> [T]he notion that any employer makes a decision based on a single motive has been significantly undermined by cognitive psychology. People are seldom, if ever, motivated to make a decision solely by one purpose or influence.

Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 Am. Bus. L.J. 511, 541 (2008). Simply put, it is well-nigh impossible to prove a person's mental state so absolutely as to include one thought and exclude all others.

Here, the D.C. Circuit dismissed the officers' case based on this unduly restrictive and scientifically impossible standard--despite evidence that a protected characteristic was a motivating factor for an employment practice. Federal courts in at least two other circuits have also imposed a sole motive causation standard. *See Tobin*, 433 F.3d at 105 n.3 (First Circuit) (refusing to consider whether employee's disability was a motivating factor in his termination); *Ricci*, 530 F.3d at 89 (Second Circuit) (denying rehearing en banc on the issue of mixed-motives because "[t]he parties did not present a mixed motive argument to the district court or to the panel."); *Nettis*, 129 Fed. Appx. at 636 (Second Circuit) (holding that jury instruction in "pretext" case could not include motivating factor language–thereby requiring plaintiffs in so-called pretext cases to prove that the unlawful factor was the sole factor for the decision.).

The risk that the courts in several other circuits will follow suit is high. The Fourth, Sixth and Ninth

Circuits have each, at times, referred to a sole motive causation standard. *See, e.g., White*, 533 F.3d at 400 n. 10 (6th Circuit) (discussing "single-motive discrimination claims brought pursuant only to . . . 42 U.S.C. § 2000e-2(a)(1)"); *Dominguez-Curry*, 424 F.3d at 1042 n. 7 (Ninth Circuit) (distinguishing between "single-motive or mixed-motives theory," but contending that the difference affects only jury instructions); *Hill*, 354 F.3d at 286 (Fourth Circuit) (referring to "single-motive theory" of discrimination). This Court should grant the petition and make clear that proof of race as the "sole motive" is never required under Title VII.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision below reversed and remanded.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT.

James E. GINGER, et al., Appellants
v.
DISTRICT OF COLUMBIA, et al., Appellees.
No. 07-7054.

Argued Jan. 18, 2008.
Decided June 10, 2008.
Rehearing En Banc Denied July 31, 2008.

Before: SENTELLE, Chief Judge, GINSBURG, Circuit Judge, and EDWARDS, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

After the Metropolitan Police Department (MPD) reorganized its Canine Unit, eight police officers in the Unit sued the District of Columbia, claiming to be victims of racial discrimination and alleging several instances of retaliation for having filed a complaint. The district court granted summary judgment to the District, which we now affirm.

I. Background

The MPD reorganized the Canine Unit in 2003. Before the reorganization, the Unit was divided into four squads, each of which worked four ten-

hour shifts per week. Squads 1 and 2 worked the "midnight shift," from 8:00 p.m. to 6:00 a.m., and Squads 3 and 4 worked the "day shift," from 10:00 a.m. to 8:00 p.m. Squad 2 was composed of seven white officers and one black officer; those eight officers are the appellants. The other squads were *1342 roughly evenly divided between whites and non-whites.

Several years before the reorganization, Alfred Broadbent, then an assistant chief of the MPD, recommended the Department switch to a system in which the canine squads would rotate between day and night shifts; he was concerned that officers on a permanent midnight shift tended to become alienated from the Department. Broadbent's recommendation was not implemented, but he raised it again after the Department of Justice had pressured the MPD to adopt measures aimed at monitoring the use of force by the Canine Unit. In 2002, when Cathy Lanier became the Commander of the Special Operations Division of the MPD, of which the Canine Unit is a part, Broadbent urged her to reorganize the Unit from four permanent ten-hour shifts to five rotating eight-hour shifts.

At around the same time, Joshua Ederheimer, head of the Civil Rights and Force Investigations Division of the MPD, noticed that Canine Unit Squad 2 alone was the source of fully 11 of the 17 dog bites for which the entire Unit of four squads was responsible in 2002. In a deposition he said he was concerned about this imbalance, particularly upon realizing that "all

but one of the officers on that squad were Caucasian and ... all of the people that had been bitten were African American." He told Lanier he was "very concerned about the racial makeup of the squad and that some kind of action had to be taken." He noted that the media and the Department of Justice might flag this disparity as indicative of a civil rights violation. Ederheimer also informed Charles Ramsey, the Chief of Police, of his concern. Ramsey said he would "do something" and would "talk to ... Lanier."

Duane Buethe, the supervisor of the Canine Unit, recounted at his deposition that he participated in a meeting with Lanier, Ederheimer, and other high-level officials of the MPD, in which the racial composition of Squad 2 was raised: "[A]fter we started talking about it and I looked at it and realized that the whole squad, with the exception of one officer, was white ... my first thought was this is not going to look good if it ever leaks out." He testified that Lanier said "oh, my, that's not going to look good" and "something's going to have to be done."

Shortly after that meeting, Lanier wrote a memorandum to Ederheimer stating in part that 11 out of 17 bites occurred with handlers in one Squad.... The squad involved in the majority of the bites has a racial make up [sic] that is predominantly white male ... in light of the information gleaned in this analysis, changes will be made ... in order to assign members with more

K-9 experience equally throughout the tours of duty. The proposed reorganization of the squads must also take into account the racial make up of those squads.

Ten days later Lanier announced the reorganization of the Canine Unit. As reorganized, there would be five squads, each of which would work five 8-hour shifts per week. One squad would work from 7:00 a.m. to 3:00 p.m., two from 3:00 p.m. to 11:00 p.m., and two from 11:00 p.m. to 7:00 a.m. The shifts would rotate every four weeks, thereby eliminating the permanent midnight shift. The eight members of Squad 2 were distributed among the five new squads.

Prophetically, Lanier noted in announcing the reorganization that "Change is never easy." According to Buethe, "Everybody [in the Unit] was upset. It was absolute turmoil." Several officers complained in their depositions about the inconvenience associated with the rotating *1343 schedule. In addition, because officers working overnight received a four percent pay differential, the members of old Squads 1 and 2- who no longer worked permanently at night-lost pay.

All eight members of Squad 2 filed a complaint of racial discrimination with the EEOC. When the EEOC failed to take action, the officers filed suit in the district court, claiming they were victims of, inter alia, racial discrimination and retaliation, in violation of Title VII of the Civil

Rights Act of 1964, 42 U.S.C. § 2000e et seq.

The district court entered summary judgment for the District. 477 F.Supp.2d 41 (2007). The court agreed with the officers that the reorganization had a sufficiently adverse effect to give them standing to complain about employment discrimination, *Id.* at 50, but rejected that claim on its merits "because every officer in the Canine Unit was subjected to the reorganization." *Id.* at 49. The court also held the alleged instances of retaliation were either insufficiently serious to support a claim for retaliation or lacked evidentiary support. *Id.* at 53-54. The officers filed a timely appeal.

II. Analysis

The officers contend the district court erred in granting summary judgment to the District on their discrimination claim because a reasonable jury could conclude the MPD reorganized the Canine Unit in order to ensure the squads were racially balanced. They also renew their argument that various disciplinary actions and other incidents constituted retaliation for filing their complaints with the EEOC. We review the judgment of the district court de novo. *Salazar v. WMATA*, 401 F.3d 504, 507 (D.C.Cir.2005).

A. Discrimination

Title VII requires that "[a]ll personnel actions affecting employees ... of the Government of the

District of Columbia ... shall be made free from any discrimination based on race." 42 U.S.C. § 2000e-16(a); *see also Borgo v. Goldin*, 204 F.3d 251, 255 n. 5 (D.C.Cir.2000) ("Title VII places the same restrictions on ... District of Columbia agencies as it does on private employers"). We analyze first whether the reorganization was a sufficiently adverse action to support a claim under Title VII; we then consider whether the officers have adduced sufficient evidence of racial discrimination to put their case before a jury.

1. Adverse action

An employment action does not support a claim of discrimination unless it has "materially adverse consequences affecting the terms, conditions, or privileges of [the plaintiff's] employment ... such that a reasonable trier of fact could find objectively tangible harm." *Forkkio v. Powell*, 306 F.3d 1127, 1131 (D.C.Cir.2002). Although "[p]urely subjective injuries, such as dissatisfaction with a reassignment ... are not adverse actions, ... reassignment with significantly different responsibilities[ ] or a significant change in benefits generally indicates an adverse action." *Id.* at 1130-31 (internal quotation marks and ellipsis omitted).

The District challenges the district court's determination that the reorganization was an adverse employment action. It contends the reorganization was not adverse because it did

not change the officers' responsibilities or cause a substantial change in their benefits.

We disagree. First, as the officers point out, they lost income as a result of the reorganization; because they worked fewer hours at night, they earned less of the pay differential for night work. A nontrivial*1344 loss of pay is an "objectively tangible harm." See Russell v. Principi, 257 F.3d 815, 818-19 (D.C.Cir.2001) (performance evaluation that resulted in "loss of a bonus that is worth hundreds of dollars" an adverse employment action).

Second, the officers were considerably inconvenienced by the reorganization. They testified that switching to a rotating shift from a permanent shift severely affected their sleep schedules and made it more difficult for them to work overtime and part-time day jobs. As the officers convincingly argue, inconvenience resulting from a less favorable schedule can render an employment action "adverse" even if the employee's responsibilities and wages are left unchanged. *See Freedman v. MCI Telecomms. Corp.*, 255 F.3d 840, 844 (D.C.Cir.2001) (holding transfer to night shift an adverse employment action because "the change in hours interfered with [the plaintiff's] education").

In sum, after the reorganization, the officers were paid less for working a substantially more difficult schedule. Clearly, these harms are "objectively tangible," not "[p]urely subjective."

Forkkio, 306 F.3d at 1130-31.

2. Causation

To evaluate a claim of racial discrimination under Title VII, we apply the analytical framework adopted by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), as restated and refined in Texas Department of Community Affairs v. Burdine:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the [adverse action]." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) *(quoting McDonnell Douglas*, 411 U.S. at 802-04, 93 S.Ct. 1817). In this case, because the District has advanced several legitimate reasons for the reorganization, our

concern is not with whether the officers have made out a prima facie case. Rather, the "central question" is whether the officers "produced sufficient evidence for a reasonable jury to find ... the employer intentionally discriminated against [them] on the basis of race." *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 (D.C.Cir.2008).

The district court entered summary judgment for the District on two grounds, neither of which withstands scrutiny. The first was that, because "every officer in the Canine Unit was subjected to the reorganization," no officer could claim employment discrimination. 477 F.Supp.2d at 49. In order to prove discrimination, however, a plaintiff need not demonstrate that "a similarly situated person outside [his] protected class [was] treated disparately." *Czekalski v. Peters*, 475 F.3d 360, 365-66 (D.C.Cir.2007); *accord Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 851 (D.C.Cir.2006) ("[W]e have expressly rejected as immaterial a requirement that the plaintiff be [treated differently from] an individual outside [his] protected class"); *George v. Leavitt*, 407 F.3d 405, 412-13 (D.C.Cir.2005) (district court erred in holding plaintiff must show he "was treated differently than similarly situated employees"); *Stella v. Mineta*, 284 F.3d 135, 146 (D.C.Cir.2002) (same).

The district court also opined, "The fact that concern about race relations plays into decision making at a macro level when developing policies on how to reorganize a police unit" does

not render the reorganization discriminatory. 477 F.Supp.2d at 49. We disagree: "[C]oncern about race relations," however important and legitimate a matter of policy it may be, does not, under Title VII, make it permissible for an employer to subject an employee to an adverse employment action because of his race. *See Taxman v. Bd. of Educ. of Twp. of Piscataway*, 91 F.3d 1547, 1563 (3d Cir.1996) (*en banc*) (holding a "non-remedial affirmative action plan cannot form the basis for deviating from the antidiscrimination mandate of Title VII").

Nevertheless, we affirm the grant of summary judgment for the District. Although race may have played a role in the reorganization, we agree with the District that a reasonable jury could not conclude, as the officers contend, that the justifications for the reorganization proffered by the District were but pretexts for racial discrimination.

There are two ways of establishing liability in a Title VII case. A plaintiff may pursue a "single-motive case," in which he argues race (or another prohibited criterion) was the sole reason for an adverse employment action and the employer's seemingly legitimate justifications are in fact pretextual. *See* 42 U.S.C. § 2000e-2(a)(1). Alternatively, he may bring a "mixed-motive case," in which he does not contest the bona fides of the employer's justifications but rather argues race was also a factor motivating the adverse action. *See* 42 U.S.C. § 2000e-2(m); *Fogg v. Gonzales*, 492 F.3d 447, 453 (D.C.Cir.2007)

(recognizing single-motive and mixed-motive theories as "alternative ways of establishing liability"). In a mixed-motive case, but not in a single-motive case, it is a partial affirmative defense that the employer would have taken the same action even "in the absence of the impermissible motivating factor"; in such a case the plaintiff is entitled only to a declaratory judgment, limited injunctive relief, and attorney's fees. 42 U.S.C. § 2000e-5(g)(2)(B); *Fogg*, 492 F.3d at 451, 453.

In this case the officers proffered evidence indicating race was a motivating factor behind the reorganization. As we have seen, both Ederheimer and Buethe testified that they participated in meetings with Lanier in which they each expressed the concern that an almost all-white squad was responsible for a disproportionate number of the dog bites caused by the entire Canine Unit, and shortly before the reorganization, Lanier wrote a memorandum to the same effect.

The officers might have had a compelling case had they argued race was one of multiple motivating factors behind the reorganization, but they did not. Rather, they brought a single-motive case: According to the officers, race was the sole reason for the reorganization, and the MPD's nondiscriminatory justifications were mere pretexts. That simply cannot be correct.

There were two aspects to the reorganization: The MPD changed the composition of the

squads, and it replaced the permanent shifts with rotating shifts. The first aspect can be explained as racially motivated, i.e., to break up the nearly all-white squad, but the second-which was the aspect that adversely affected the officers and gave rise to this action-cannot. If the sole motivation for the reorganization had been to ensure the squads were racially more balanced, then the MPD could simply have switched some white members of Squad 2 with non-white members of other squads. It took the more consequential steps, however, of changing the *1346 hours a shift would work and of rotating the squads through the various shifts-steps entirely unrelated to the racial composition of the squads. The officers, however, adduced no evidence whatsoever of a causal link between race and those aspects of the reorganization.

In contrast, the District presented three legitimate justifications for changing the officers' schedules. Lanier testified that rotating the units would decrease the likelihood a single squad would be responsible for a majority of the dog bites, which occur disproportionately at night. She also said she wanted to add a new sergeant to the Canine Unit, which by itself necessitated some reorganization. Finally, Broadbent testified that he believed the permanent midnight shift was undesirable because the officers tended to become alienated from the department.

The officers contend those justifications were intended to cover up the MPD's true motivation,

but their theory is not supported by the record. Recall that in her memorandum, Lanier flatly stated that "[t]he squad involved in the majority of the bites ... is predominantly white male" and that "[t]he proposed reorganization ... must ... take into account the racial make up of those squads." To conclude race was her sole motive for reorganizing the unit, therefore, one would have to believe Lanier would make a significant change in every officer's work schedule in order to cover up a motivation that could not be covered up; she had not only discussed her concern about race openly with other senior officials in the MPD but even committed it to writing in an official document. Recall, too, that Broadbent had proposed switching to a system of rotating shifts years before the racial composition of Squad 2 became a concern, which further weakens the officers' theory that the MPD's justifications were a pretext for racial discrimination. In sum, the officers never contended this was a mixed-motive case, and no reasonable jury could conclude the District's justifications were pretextual, leaving race as the sole motivation for reorganizing the Unit; therefore, the district court properly entered summary judgment for the District.

B. Retaliation

Title VII makes it unlawful for an employer to retaliate against an employee for filing a charge of discrimination. See42 U.S.C. § 2000e-3(a); *Borgo*, 204 F.3d at 255 n. 5. An act of retaliation gives rise to a separate cause of action under

Title VII if it is of sufficient significance that it "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe R.R. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) (internal quotation marks omitted); *Rochon v. Gonzales*, 438 F.3d 1211, 1217-18 (D.C.Cir.2006) (internal quotation marks omitted).

The officers refer to numerous incidents they claim constitute unlawful retaliation, ranging from unjustified reprimands to unwarranted drug testing. Only one of the incidents, however, has any documentary support: One month after the officers filed their discrimination charges with the EEOC, Lanier issued a memorandum announcing that because "there have been several Instances [sic] when the Special Operations Division has had little to no officers working on Saturdays and Sundays," she would require "two squads from every Branch that have middle of the week days off" to work weekends. The memorandum then stated that "[t]hese squads will be formed strictly by seniority."

Two of the adversely affected officers contend this policy constituted retaliation. They do not dispute, however, that the Department had too few police officers working weekends or that the policy was implemented strictly upon the basis of seniority; nor do they give any reason to believe that Lanier's justification for the policy might have been pretextual. In sum, they assert the

policy was retaliatory, but they proffered no evidence upon the basis of which a reasonable jury could agree. *See Greene v. Dalton*, 164 F.3d 671, 675 (D.C.Cir.1999) ("Because [the plaintiff's] claim of retaliation rests entirely upon a conclusory representation, the district court was right to dismiss it").

The officers' other claims of retaliation relate to supposedly undeserved disciplinary actions and other instances of harassment, but all their allegations are vague and even those that should have left a paper trail are unsupported by any documentary evidence. "[A] mere unsubstantiated allegation ... creates no genuine issue of fact and will not withstand summary judgment." *Harding v. Gray*, 9 F.3d 150, 154 (D.C.Cir.1993) (internal quotation marks omitted).

III. Conclusion

The officers presented no evidence to impugn the MPD's nondiscriminatory justifications for moving the Canine Unit from permanent to rotating shifts. Their allegations of retaliation are conclusory, vague, and for the most part unsubstantiated. The judgment of the district court is therefore

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Sgt. James E. GINGER, et al., Plaintiffs,

v.

DISTRICT OF COLUMBIA, et al., Defendants.

Civil Action No. 03-2512 (EGS).
March 5, 2007

MEMORANDUM OPINION

SULLIVAN, District Judge.

Eight Canine Unit officers have brought suit against the Metropolitan Police Department ("MPD") claiming race discrimination, retaliation, and a hostile work environment based on a reorganization of the unit that occurred in 2003. Pending before the Court is Defendants' Renewed Motion for Summary Judgment. Upon careful consideration of the motion, response and reply thereto, the applicable law, and the entire record, the Court grants defendants' motion.

I. BACKGROUND

Plaintiffs are eight District of Columbia Metropolitan Police Department officers employed in the Canine Unit of the Special Operations Division. Am. Compl. ¶¶ 4-5; Def. District of Columbia's Statement of Material

Facts as to Which There is No Genuine Issue ("Defs.' Facts") ¶ 9.FN1 Plaintiffs James E. Ginger, Paul E. Hustlar, Michael J. Lewis, Bernard D. Richardson, Mark W. Wood, Robert M. Wigton, and Roy Potter are white. Am. Compl. ¶ 4. Plaintiff Sean S. LaGrand is African American. *Id.* ¶ 5. All of the plaintiffs were members of the same squad within the Canine Unit (Squad 2) and supervised by Sergeant Ginger prior to the Department's reorganization of the entire Canine Unit, which was announced in March 2003. Defs.' Facts ¶¶ 9, 44.

FN1. The facts in this section are undisputed by the plaintiffs in Plaintiffs' Response to Defendants' Statement of Material Facts as to Which There is No Genuine Issue ("Pls.' Facts"), unless otherwise indicated.

Prior to its reorganization, the Canine Unit was divided into four squads, each with a sergeant as a supervisor. *Id.* ¶ 8. Squad assignments were based on individual preferences and seniority. See *Id.* ¶ 16.FN2 Two of the squads worked the midnight shift (8:00 p.m. to 6:00 a.m.) and two of the squads worked the day shift (10:00 a.m. to 8:00 p.m.) *Id.* ¶ 13. Squad 2 worked the midnight shift. *Id.* On March 6, 2003, Cathy Lanier, Commander of the Special Operations Division, issued a memorandum announcing that the MPD was going to reorganize the Canine Unit so that all canine officers would work five eight-hour shifts per week instead of four ten-hour shifts and would rotate through different shifts instead of being assigned to a permanent day or night

shift. Defs.' Facts ¶ 44.

FN2. Plaintiffs contend that seniority only figured into days off and everything else regarding squad assignments was based on personal preference. Pls.' Facts ¶¶ 16-17.

Plaintiffs allege that the reorganization occurred because of a perception that Squad 2 was "too white" and because of a concern about how the media would react to a mostly white squad whose victims were mostly black. Am. Compl. ¶ 11. Plaintiffs dispute the MPD's proffered reasons for the reorganization, including the need to increase supervision, equalize workloads of squads, reduce exposure of certain squads to high-risk canine activities, ensure coverage during high-crime times, and distribute seniority more evenly across the Canine Unit. Defs.' Facts ¶¶ 44-58. Plaintiffs instead claim that political pressure drove the defendants to break up Squad 2 in order to spread out canine bites *47 among a more diverse officer population. *Id.* Prior to the reorganization, an analysis performed by an Independent Monitor selected by the Department of Justice and the MPD revealed that 11 out of 17 bites (65%) occurred with handlers in one squad-Squad 2. Am. Compl. ¶ 9; Defs.' Facts ¶ 29. The analysis also revealed that Squad 2, which was involved in the majority of the bites, had a racial makeup that is predominantly white male-6 out of 7 officers and the sergeant are white males. Am. Compl. ¶ 9.FN3

FN3. Prior to the reorganization, the entire Canine Unit, including sergeants, totaled twenty-two whites (54%), fourteen African Americans (34%), three Hispanics (7%), one Asian American (2.5%), and one Native American (2.5%). Defs.' Facts ¶ 11.

II. DISCUSSION

A. Standard of Review

This case is before the Court on defendants' renewed motion for summary judgment. Pursuant to Federal Rule of Civil Procedure 56, summary judgment should be granted only if the moving party has shown that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Waterhouse v. Dist. of Columbia*, 298 F.3d 989, 991 (D.C.Cir.2002). In determining whether a genuine issue of material fact exists, the Court must view all facts in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

B. Employment DiscriminationFN4

FN4. The plaintiffs make employment discrimination and retaliation claims under Title VII and 42 U.S.C. § 1981. The analysis is the same for both types of claims. *See Berger v. Iron Workers Reinforced Rodmen Local 201*, 843

F.2d 1395, 1412 n. 7 (D.C.Cir.1988).

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Where there is no direct evidence of discrimination, the Court applies the McDonnell Douglas burden-shifting framework under which the plaintiff must first establish a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). If the plaintiff successfully establishes a prima facie case, the burden shifts to the defendant employer "to articulate some legitimate, nondiscriminatory reason" for the employment action. *Id.* If the employer meets it burden, the burden then shifts back to the plaintiff to "prove by a preponderance of the evidence that the [employer's] proffered reasons are a pretext for discrimination." *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 850 (D.C.Cir.2006) (*citing Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)). The McDonnell Douglas framework was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).

The "central focus of the inquiry" in such cases "is always whether the employer is treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.' " *George v. Leavitt*, 407 F.3d 405, 411 (D.C.Cir.2005) (*quoting Furnco*, 438 U.S. at 577, 98 S.Ct. 2943) (internal quotation marks and citations omitted). In this case, all officers in the Canine Unit were equally affected by the reorganization in that all officers were required to work rotating shifts regardless of race. Without any showing of disparate treatment, there is no discrimination in this case.

To make out a prima facie case of disparate-treatment discrimination, a plaintiff must establish that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) "the unfavorable action gives rise to an inference of discrimination." *George*, 407 F.3d at 412 (internal quotation marks and citations omitted). The Title VII plaintiff "carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on discriminatory criterion illegal under the Act.' " *Furnco*, 438 U.S. at 576, 98 S.Ct. 2943 (*quoting Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). The plaintiffs in this case have failed to even meet their initial burden.

1. Membership in a protected class

Plaintiffs allege that the MPD discriminated against them by reorganizing the entire Canine Unit as a result of Squad 2 being "too white." FN5 In reverse discrimination cases, a plaintiff must do more than simply show that he is white in order to make out the first prong of a prima facie case of discrimination. *Mastro*, 447 F.3d at 851. A majority-group plaintiff alleging employment discrimination must show "additional background circumstances that support the suspicion that the defendant is that unusual employer that discriminates against the majority." *Id.* (*quoting Harding v. Gray*, 9 F.3d 150, 153 (D.C.Cir.1993)). The "background circumstances" requirement " 'substitutes for the minority plaintiff's burden to show that he is a member of a racial minority.' " *Id.* (*quoting Harding*, 9 F.3d at 153).

FN5. Even though one plaintiff in this case is black, that does not prevent him from stating a claim based on his association with the white plaintiffs who claim discrimination because of their race. *See Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 574 (6th Cir.2000) ("[I]n order to state a cognizable claim under Title VII, the plaintiff himself need not be a member of a recognized protected class; he need only allege that he was discriminated [against] on the basis of his association with a member of a recognized protected class.").

To demonstrate background circumstances, a plaintiff must provide evidence from one of the following categories: (1) evidence indicating that

the employer " 'has some reason or inclination to discriminate invidiously against whites' "; FN6 or (2) evidence indicating that " 'there is something "fishy" about the facts of the case at hand that raises an inference of discrimination.' " FN7 *Id.* (*quoting Harding*, 9 F.3d at 153). However, the burden of establishing "background circumstances" is "minimal," *Id.* at 852, and not intended to be "an additional hurdle for white plaintiffs." *Harding*, 9 F.3d at 154.

FN6. In this category, the D.C. Circuit has found sufficient such evidence as political pressure to promote a minority because of his race, pressure to promote minorities in general, and proposed affirmative action plans. *Mastro*, 447 F.3d at 851.

FN7. In this category, the D.C. Circuit has found sufficient evidence that a plaintiff was given little or no consideration for a promotion and that the supervisor never fully reviewed the qualifications of the minority promotee; and evidence that a minority applicant was promoted over four objectively better-qualified white applicants in an unprecedented fashion. *Id.* at 851-52.

Plaintiffs argue that when the defendants reassigned all the officers in the Canine Unit and changed their shift assignments because of the perception that Squad 2 was "too white" and because of the fear of political and public perception, they violated Title VII. Pls.' Opp'n at 16. They further argue that there is enough

evidence to show "additional background circumstances that support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Id.* at 22 (*quoting Mastro*, 447 F.3d at 851). Plaintiffs argue that the defendants admit that part of the backdrop for the reorganization was defendants' concern about potential or perceived civil rights violations because a mostly white squad within the Canine Unit had more bites than other squads and the majority of victims were black. *See* Pls.' Opp'n at 23. Plaintiffs contend that moving white officers from a permanent shift to rotating shifts with no evidence of wrongdoing and just because of perceptions about race relations shows that the defendants have "some reason or inclination to discriminate invidiously against whites." *Id.*

Defendants counter that the Metropolitan Police Department does not have a historical background suggesting it discriminates against whites nor is there any evidence that the Department faces political pressure to treat blacks more favorably. Defs.' Renewed Mot. for Summ. J. at 14. Defendants argue that to the extent race was taken into account at all prior to the reorganization, it was in the context of the Department's civil rights concerns based on canine bite statistics. *Id.* Moreover, there is no disparity in treatment between different races in this case because every officer in the Canine Unit was subjected to the reorganization.

The fact that concern about race relations plays

into decision making at a macro level when developing policies on how to reorganize a police unit is not sufficient to support the suspicion that the Metropolitan Police Department is the unusual employer that discriminates against the majority. This case lacks a very important element: some sort of difference in treatment among officers because of their race.

2. Adverse employment action

An employee suffers an adverse employment action if he experiences "materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm." *Forkkio v. Powell*, 306 F.3d 1127, 1131 (D.C.Cir.2002) (*citing Brown v. Brody*, 199 F.3d 446, 457 (D.C.Cir.1999)). "Mere idiosyncracies of personal preference are not sufficient to state an injury." *Brown*, 199 F.3d at 457. "Purely subjective injuries," such as dissatisfaction with a reassignment, public humiliation, or loss of reputation, are not adverse actions. *Forkkio*, 306 F.3d at 1131. While a lateral transfer alone with no diminution in pay or benefits is not an adverse employment action, *Brown*, 199 F.3d at 457," 'reassignment with significantly different responsibilities, or ... a significant change in benefits' generally indicates an adverse action." *Forkkio*, 306 F.3d at 1131 (*quoting Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998)).

Plaintiffs argue that they suffered an adverse employment action because they were forced to rotate shifts and lost their night differential. Pls.' Opp'n at 20. Prior to the reorganization, all plaintiffs worked the midnight shift on a permanent basis and received the night differential (4% of the officer's base pay). *Id.* After the reorganization, plaintiffs would only *50 get the night differential when rotating through the night shift. In addition, plaintiffs argue that they lost overtime opportunities when they were forced to work rotating shifts because they could not routinely testify in court during the day. *Id.* Moreover, plaintiffs were precluded from maintaining other part-time work and incurred additional expenses for childcare that they did not incur prior to the reorganization. *Id.*

Defendants argue that plaintiffs suffered no loss in pay or benefits following the reorganization and, therefore, the shift changes were akin to lateral transfers. Defs.' Renewed Mot. for Summ. J. at 9. Defendants also argue that any shift changes should be looked at in context. According to the defendants, plaintiffs were routinely required to alter their schedules for special events in D.C. such as terrorist alerts, protests, and presidential details. *Id.* at 10. Defendants argue that because plaintiffs had frequently varying work schedules, the change from a permanent midnight shift to a rotating schedule was not an adverse employment action. *Id.* Defendants further argue that the loss of the night differential is not sufficient to transform a

lateral transfer into an adverse employment action. *Id.* at 11. Defendants point out that plaintiffs still earned the night differential when rotating through evening and night shifts so there was only a minimal loss in pay. *Id.* Finally, defendants argue that plaintiffs still have tons of opportunities for overtime but choose not to work as much overtime now that they have switched to the rotating shifts. Defs.' Reply at 4.

Freedman v. MCI Telecomms. Corp., 255 F.3d 840 (D.C.Cir.2001), appears to be directly on point. In Freedman, the plaintiff argued that he suffered an adverse employment action when he was transferred from the day shift to the night shift. The D.C. Circuit suggested in dicta that the transfer was an adverse employment action:

> Thus, it is not enough to ask whether the transfer was purely lateral. We must also ask if other changes in terms, conditions, or privileges followed from the transfer. It is hard to say that transfer to the night shift would not constitute such a change, at least in conditions or privileges. Freedman testified that the change in hours interfered with his education. Further, the fact that Freedman received a pay differential for working on the night shift does not, as the district court held, necessarily demonstrate that he was not adversely affected

> by the change. Rather, it could demonstrate that the night shift was an undesirable assignment.

Id. at 844. Similar to Freedman, it is hard to say that a change from a permanent midnight shift to a rotating shift where one's schedule changes every month is not a change in the conditions or privileges of employment sufficient to constitute an adverse employment action.

3. Inference of discrimination

One way a plaintiff can satisfy the third prong of the prima facie test is by establishing that "she was treated differently from similarly situated employees who are not part of the protected class." *George*, 407 F.3d at 412. Although the Circuit Court has held that showing different treatment than similarly situated employees is not the only way to establish the third prong of the prima facie test, see *George*, 407 F.3d at 412,FN8 an employee alleging discrimination based on changed conditions or terms of employment must make some sort of showing that the change affected him in some way different from other employees. *See Burlington Northern & Santa Fe Ry. v. White*, --- U.S. ----, ----, 126 S.Ct. 2405, 2410, 165 L.Ed.2d 345 (2006) ("No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals."). If every single employee in a racially diverse Canine Unit faces the same change in the terms and conditions of his employment after a

reorganization, there are no "distinctions or differences in treatment." Under such circumstances, it is difficult to see how the reorganization somehow gives rise to an inference of discrimination.

FN8. In failure to hire cases, a plaintiff meets the burden of demonstrating an inference of discrimination if he establishes that the failure to hire is not attributable to "an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." Stella v. Mineta, 284 F.3d 135, 145 (D.C.Cir.2002) (internal citation and quotation marks omitted). In an unlawful discharge case, a plaintiff can demonstrate an inference of discrimination by demonstrating that the discharge was not attributable to "performance below the employer's legitimate expectations or the elimination of the plaintiff's position altogether." George, 407 F.3d at 412.

Plaintiffs argue that the record is replete with evidence that race was a reason for the "so-called reorganization." Pls.' Opp'n at 17. They point to evidence that higher level police officials were concerned about the racial make up of the squads when they decided to undertake the reorganization and that those officials took race into account when realigning the squads. *Id.* at 18. Defendants counter that all officers in the Canine Unit equally experienced the reorganization, and without any disparate treatment, there can be no inference of discrimination. Defs.' Reply at 2. Given that some sort of different treatment is at the heart

of a discrimination claim, plaintiffs' arguments fail.

C. Retaliation

Under Title VII, it is unlawful for an employer to discriminate against an employee because that employee "opposed any practice" made unlawful by Title VII, or because he "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. § 2000e-3(a). In order to make out a prima facie case of retaliation, a plaintiff must show that (1) he engaged in a statutorily protected activity; (2) the employer took an adverse action against him; and (3) there is a causal connection between the two. *Taylor v. Small*, 350 F.3d 1286, 1292 (D.C.Cir.2003). The plaintiff must show that a reasonable employee would have found the challenged action to be "materially adverse," meaning it "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' " *Burlington Northern & Santa Fe Ry.*, 126 S.Ct. at 2415 (*quoting Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C.Cir.2006) (citation omitted)). A plaintiff can satisfy the causal connection requirement by showing that " 'the employer had knowledge of the employee's protected activity, and ... the adverse personnel action took place shortly after that activity.' " *Holcomb v. Powell*, 433 F.3d 889, 903 (D.C.Cir.2006) (*quoting Mitchell v. Baldrige*, 759 F.2d 80, 89 (D.C.Cir.1985)).

The McDonnell Douglas burden-shifting framework applies to retaliation claims. *See Broderick v. Donaldson*, 437 F.3d 1226, 1231-32 (D.C.Cir.2006). If a plaintiff is able to establish a prima facie case of retaliation, there is a presumption of unlawful discrimination and the burden shifts to the defendant to rebut the presumption by asserting a legitimate, nondiscriminatory reason for its actions. *Smith v. Dist. of Columbia*, 430 F.3d 450, 455 (D.C.Cir.2005). Once the defendant does so, the Court must determine "whether a reasonable jury could infer intentional discrimination from the plaintiff's prima facie case and any other evidence the plaintiff offers to show that the actions were discriminatory or that the non-discriminatory justification was pretextual." *Id.* (internal quotation marks and citations omitted).

There is no dispute that plaintiffs engaged in a statutorily protected activity when they filed a complaint with the EEOC on April 21, 2003. However, defendants argue that the plaintiffs did not suffer an adverse employment action and/or cannot show a causal connection between any adverse employment action and the filing of the EEOC complaint. Defs.' Renewed Mot. for Summ. J. at 21-24.

Plaintiffs allege the following acts of retaliation: (1) rotating shifts beginning in June or July 2003; (2) Officer Wigton was assigned day work for further training without justification; (3) Officer Wood had a canine bite that was determined to

be justified, yet was still recommended to attend a class that did not exist; (4) Officer LaGrand was recommended for (but not actually subjected to) adverse action in May 2003 because of a canine bite that occurred in June 2002; (5) Sergeant Ginger had a canine bite in January 2005 for which he was told further investigation was needed and he claims that nothing inappropriate occurred; (6) Officer Wood was off for a week instead of the normal three days for an investigation and, according to Sergeant Ginger, only brought back because Sergeant Ginger said the Department's actions against Wood looked like retaliation; (7) a complaint filed against Officer LaGrand by a citizen who got a parking ticket was handled by the Office of Professional Responsibility, Internal Affairs Division ("IAD") instead of the Bureau of Traffic Adjudication ("BTA"), resulting in an allegation against Officer LaGrand; FN9 (8) Officer Potter was assigned Tuesdays and Wednesdays off instead of having at least one weekend day shortly after the filing of the EEOC complaint. Pls.' Opp'n at 27-28.FN10 None of these allegations are sufficient for plaintiffs' retaliation claim to survive summary judgment.

FN9. An officer is placed in an early warning tracking system after three allegations. LaGrand Dep. at 112.

FN10. In addition to the claims delineated above, Officer Richardson claimed in response to interrogatories that he was retaliated against because he was investigated twice for overtime

fraud by Internal Affairs and there were times when supervisors would not sign his overtime slips. See Pls.' Opp'n at 32 (hostile work environment section of brief). Plaintiffs do not address these claims in the section of their opposition brief discussing retaliation. As discussed in this Memorandum Opinion, mere investigations are not sufficient to support a retaliation claim. Moreover, plaintiffs offer no evidence suggesting that these incidents were tied to the filing of an EEOC complaint or this lawsuit. Finally, plaintiffs offer no evidence to rebut defendants' legitimate explanation that only a lieutenant or other official, and not a sergeant, could sign overtime slips when an officer was under investigation for overtime fraud. See Defs.' Reply at 14.

Plaintiffs cannot show a causal connection between the shift changes that the entire unit faced and the filing of their EEOC complaint. Plaintiffs do not dispute that the decision to rotate shifts was announced on March 6, 2003, a month and a half before they filed their EEOC complaint. To establish a causal connection, the adverse connection must take place after the employee's protected activity. *See Holcomb*, 433 F.3d at 903.

Sergeant Ginger's claim that he was investigated for a canine bite that *53 occurred in January 2005 also is not sufficient to establish the required causal connection to make out a prima facie case of retaliation. This investigation did not occur until over a year and a half after the

plaintiffs filed their EEOC complaint and a year after the first complaint was filed in this Court. Too much time elapsed to establish a causal connection. To qualify as a causal connection, the temporal proximity between the employer's knowledge of the protected activity and the adverse personnel action must be "very close." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (noting that a three- or four-month lapse between a protected activity and an adverse action is insufficient to show a causal connection and that a 20-month period suggests "no causality at all").

Plaintiffs also cannot establish a prima facie case of retaliation based on investigations into their conduct. The mere initiation of an investigation into a plaintiff's conduct is not an adverse employment action when it has no effect on the plaintiff's employment. *See Runkle v. Gonzales*, 391 F.Supp.2d 210, 226-27 (D.D.C.2005); *Ware v. Billington*, 344 F.Supp.2d 63, 76 (D.D.C.2004) ("[A]lthough the discipline imposed as a result of an investigation may have a sufficiently adverse effect on plaintiff's employment to be actionable, the mere initiation of the investigation does not."); *Mack v. Strauss*, 134 F.Supp.2d 103, 114 (D.D.C.2001), *aff'd*, 2001 WL 1286263 (D.C.Cir. Sept.28, 2001) ("[M]ere investigations by plaintiff's employer cannot constitute an adverse action because they have no adverse effect on plaintiff's employment."). Moreover, plaintiffs do not dispute that none of the investigations into their conduct that occurred after the

reorganization have resulted in discipline or suspension. Defs.' Facts ¶ 72; Pls.' Facts ¶ 72.

Similarly, the allegation against Officer LaGrand is not sufficient to support a claim for retaliation. First, the allegation would only result in disciplinary action if Officer LaGrand were to receive two additional allegations at some point in the future. The single allegation is not an adverse employment action sufficient to support a claim of retaliation. *See Romero-Ostolaza v. Ridge*, 370 F.Supp.2d 139, 150 (D.D.C.2005) (finding that placement on an Employee Proficiency Program or "EPP" was not an adverse employment action even though plaintiff could possibly face demotion, termination, or reassignment at some point in the future if the plaintiff failed to meet the requirements of EPP).

Sergeant Ginger's claim that Officer Wood had to spend a week or so on leave pending the conclusion of an investigation into a canine bite instead of the normal three days is also not sufficient to establish a claim of retaliation. Plaintiffs do not state any evidence from Officer Wood substantiating this claim. Moreover, there is no suggestion by either Officer Wood or Sergeant Ginger that Officer Wood suffered any loss in pay, benefits or job responsibilities as a result of the time off or the investigation. *See Dickerson v. SecTek, Inc.*, 238 F.Supp.2d 66, 80 (D.D.C.2002) (finding "no compelling reason to conclude that short suspensions that leave no lasting effect on either the employee's present or

future position or her pocketbook are adverse employment actions").

The mere fact that someone in the Department recommended that Officer Wood go to a class after having a canine bite is certainly not the kind of action that a reasonable employee would find materially adverse. Officer Wood was never even required to attend the class. *See* Ginger Dep. at 101-02.

*54 Sergeant Ginger's assertion that he thought it was "ridiculous" that Officer Wigton was put on day work for further training, see Ginger Dep. at 101, is also not sufficient for the Court to find that this training was materially adverse or that a reasonable employee would be dissuaded from reporting discrimination. Plaintiffs have not offered any statements from Officer Wigton regarding this training and Sergeant Ginger indicated that he could not answer any questions about Officer Wigton's training. *Id.* Sergeant Ginger's personal opinion that the additional training for Officer Wigton was ridiculous is not sufficient to make out a prima facie case of retaliation.

Even assuming that requiring employees to take days off in the middle of the week when they previously had at least one weekend day off could be considered an adverse employment action sufficient to make out a prima facie case of retaliation, plaintiffs have failed to provide evidence that the Department's legitimate, non-discriminatory reasons for assigning weekdays

off were pretextual. The plaintiffs do not dispute that, following the reorganization, the Canine Unit suffered shortages of officers on the weekends. Defs.' Facts ¶ 69.FN11 In a memorandum issued on May 22, 2003, Commander Lanier informed the entire Special Operations Division (of which the Canine Unit is a part) that because of a lack of officers working on Saturdays and Sundays, two squads from every Branch would be formed that would have middle of the week days off and that these squads would be formed "strictly by seniority." Memorandum from Commander Cathy Lanier to All Members of the Special Operations Division (May 22, 2003), Ex. S to Defs.' Renewed Mot. for Summ. J. Plaintiffs provide no evidence that they were forced to have days off in the middle of the week when other officers were not. Moreover, plaintiffs' own statements confirm that seniority determined days off. See Ginger Dep. at 127 ("Q: But because of your seniority, you have always kept a weekend day off? A: Because I'm a senior sergeant, I got what days off I wanted-yes."); Wigton Dep. at 55 (agreeing that days off were determined by seniority). Therefore, plaintiffs cannot show pretext.

FN11. Plaintiffs allege that there were shortages on weekdays and weekends after the reorganization, Pls.' Facts ¶ 69.

D. Hostile Work Environment

A workplace is hostile for purposes of Title VII only when "the workplace is permeated with

discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *George*, 407 F.3d at 416 (*quoting Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998)) (citations and internal quotation marks omitted). The conduct must be "extreme" to constitute a change in the terms or conditions of employment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). In determining whether the workplace is sufficiently hostile or abusive to violate Title VII, "courts should consider the frequency of the harassing conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance." *Stewart v. Evans*, 275 F.3d at 1133-34 (D.C.Cir.2002) (*citing Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)). " '[S]imple teasing,' ... offhand comments, and isolated incidents*55 (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.' " *Faragher*, 524 U.S. at 788, 118 S.Ct. 2275 (citation omitted). Moreover, "[e]xcept in extreme circumstances, court have refused to hold that one incident is so severe to constitute a hostile work environment." *Stewart*, 275 F.3d at 1134. "Even a few isolated incidents of offensive conduct do not amount to actionable harassment." *Id.*

In this case, plaintiffs have failed to allege any conduct that is sufficiently severe or pervasive to constitute a hostile work environment. Plaintiffs's hostile work environment claim principally relies on the following: (1) a drawing placed on Squad 2's locker that depicts members of the squad as KKK members and has written on the bottom "The Good Ol' Day's"; (2) the words "KKK," "Whitey Rules," or "The Good Ol Boy Squad" written on the chalkboard; (3) receiving Nazi salutes from coworkers; (4) silent treatment by other officers; (5) general racist stigma and blame for reorganization by other officers; (6) refusal to sign Officer Richardson's overtime slips.

Whether considered in isolation or taken together, these incidents do not provide sufficiently severe or pervasive conduct to support a hostile work environment claim. *See Woodland v. Joseph T. Ryerson & Son, Inc.*, 302 F.3d 839, 844 (8th Cir.2002) (finding that "sporadic racially-motivated misconduct by [plaintiff's] coworkers was neither severe nor pervasive enough to create a hostile work environment") (citation and internal quotation marks omitted). Plaintiffs do not allege that any of these incidents were physically threatening, nor do they provide any information about the frequency with which these incidents occurred. This is not the type of conduct that is so extreme that it constitutes a change in the conditions or terms of employment.

Moreover, the Department can only be held

liable for harassment of the plaintiffs by fellow employees "if the employer knew or should have known of the harassment and failed to implement prompt and appropriate corrective action." *Curry v. Dist. of Columbia*, 195 F.3d 654, 660 (D.C.Cir.1999). With the exception of the refusal of Officer Richardson's supervisors to sign his employment slips, plaintiffs do not dispute that all of the other instances of alleged conduct giving rise to their hostile work environment claims came from fellow employees. *See* Pls.' Opp'n at 36.FN12 As for the writing on the chalkboard of racist sayings, Officer Richardson immediately erased these sayings and did not report them to anyone. See Defs.' Renewed Mot. for Summ. J. at 27. Therefore, the employer could not reasonably have been expected to know of these incidents or take action against them. Regardless, such anonymous written racial epithets are insufficient to establish a hostile work environment claim. *See Woodland*, 302 F.3d at 844 (holding that racist graffiti-drawings of "KKK," a swastika, and a hooded figure-removed from restroom walls was insufficient to establish a hostile work environment).

FN12. Plaintiffs fail to provide sufficient allegations or evidence to suggest that the refusal to sign overtime slips was connected to race or any protected activity.

Although there is some dispute about the adequacy of the investigation into the KKK drawing, there is no dispute that the

Department's Office of Internal Affairs ("OIA") did conduct an investigation. Moreover, no further such drawings were ever reported. Regardless, of the adequacy of the investigation, the anonymous placement of such a drawing on the *56 squad's locker on one occasion is not the type of extreme conduct that gives rise to a hostile work environment claim.

E. D.C. Human Rights Act Claims

In addition to their federal claims, plaintiffs allege violations of the District of Columbia Human Rights Act ("DCHRA"). DCHRA and federal discrimination claims are analyzed under the same legal standard. *See Price v. Washington Hosp. Ctr.*, 321 F.Supp.2d 38, 47 (D.D.C.2004); *Futrell v. Dep't of Labor Fed. Credit Union*, 816 A.2d 793, 802 (D.C.2003). Because plaintiffs federal claims fail, their DCHRA claims cannot survive either.

III. CONCLUSION

For the foregoing reasons, the Court grants defendants' motion for summary judgment. An appropriate order accompanies this Memorandum Opinion.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendants' Renewed Motion

for Summary Judgment is GRANTED; and it is

FURTHER ORDERED that plaintiffs' claims are DISMISSED WITH PREJUDICE; and it is

FURTHER ORDERED that the Clerk shall enter final judgment in favor of defendants and against plaintiffs. This is a final appealable order. SeeFed. R.App. P. 4(a).

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-7054 September Term 2007
03cv02512

Filed on: July 31, 2008

James E. Ginger, Sargeant, Special Operations Division, et aI.,

Appellants

v.

District of Columbia, et aI.,

Appellees

BEFORE: Sentelle, Chief Judge, and Ginsburg, Circuit Judge, and Edwards, Senior Circuit Judge.

ORDER

Upon consideration of appellants' petition for panel rehearing filed on July 10, 2008, the motion of movant-amicus curiae Metropolitan Washington Employment Lawyers Association for leave to file a brief as amicus curiae in support of appellant's petition for rehearing, and the lodged brief, it is

ORDERED that motion for leave be denied. The Clerk is directed to return to movant-amicus curiae the lodged brief. It is

FURTHER ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

BY: /s/
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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03cv02512

Filed on: July 31, 2008

James E. Ginger, Sargeant, Special Operations Division, et aI.,

Appellants

v.

District of Columbia, et aI.,

Appellees

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Edwards, Senior Circuit Judge.

ORDER

Upon consideration of appellants' petition for rehearing en bane, and the absence of a request by any member of the court for a vote, it

is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

BY: /s/
Michael C. McGrail
Deputy Clerk